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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re M.J., a Person Coming Under the
Juvenile Court Law.

B208471
(Los Angeles County
Super. Ct. No. CK17452)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.J.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Emily A. Stevens, Judge. Affirmed.

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

L.J. (Mother) appeals from an April 30, 2008 order denying visitation and terminating dependency jurisdiction with respect to her daughter, M.J. (born in December 1994), who had been placed in a legal guardianship in 2004 with a nonrelative caretaker. Mother contends that the juvenile court deprived her of due process by denying her request that M.J. testify. But substantial evidence supports the juvenile court's finding that testifying would have caused M.J. great psychological harm, so we affirm the order.

BACKGROUND

Because of Mother's mental health problems and abuse of prescription drugs, M.J. was a dependent of the juvenile court and placed in foster care on two prior occasions in 1995 and 1999 before being reunited with Mother.¹ In September 2002, when M.J. was seven years old, she was detained again when Mother lost consciousness after an overdose of acetaminophen and was hospitalized. M.J. was placed with Claudia A., her former foster parent and a family friend.

M.J., who was very bright and verbal, told a social worker from the Los Angeles County Department of Children and Family Services (DCFS) that she was scared when Mother took pills; Mother's arms and legs would shake and sometimes Mother would fall asleep on the couch or fall unconscious to the floor; M.J. had to call the paramedics for Mother about four or five times. On those occasions Claudia A. or the maternal grandmother would come and pick up M.J. M.J.'s earliest memory of Mother dealt with Mother taking too many pills. M.J. also had nightmares about paramedics being unable to wake up Mother.

M.J.'s teacher reported to DCFS that M.J. was sometimes unable to focus on her school work because she was worrying about Mother. The social worker also reported that M.J. appeared to be withdrawn and quiet for her age, concluding that "[i]t appears that [M.J.] has actually been the real parent in this case since she was last detained by [DCFS] in 1997. It is [M.J.] who wakes her mother from sleep on buses and trains. It is

¹ Mother had not had contact with M.J.'s father for several years; he had never supported M.J., and he did not appear in these proceedings.

[M.J.] that phones emergency medical personnel to her home when her mother overdoses. It is [M.J.] that makes her own lunch while her mother sleeps on the couch. This is a child who yearns to do child-like activities Unfortunately, her mother is so tied up in her own personal world that activities beyond survival will most likely not be an option for this child unless family friend, Claudia A[.], provides it.”

In October 2002, M.J. was declared a dependent of the juvenile court pursuant to Welfare and Institutions Code section 300, subdivisions (g) (no provision for support against M.J.’s father only) and (b) (failure to protect) based on Mother’s history of chronic mental illness and abuse of prescription drugs.² M.J. was removed from Mother’s custody. Mother was afforded monitored visitation and ordered to participate in drug rehabilitation with random testing and individual counseling to address her depression and case issues. M.J. was ordered to attend individual counseling.

Mother enrolled in a drug treatment program in November 2002. According to an April 2003 status review report, M.J.’s performance in school had improved and she cried about Mother less frequently; but M.J continued to have difficulty talking to Mother without getting sad or upset afterward. Mother attended her drug treatment program but had missed six drug tests between November 2002 and February 2003. In April 2003, the juvenile court found Mother in partial compliance with the case plan.

In May 2003, Mother completed her drug treatment program. In October 2003, DCFS reported that Mother’s visits were then unmonitored and that M.J. wanted to return to Mother. But M.J. “continues to play the role of the parent when she thinks about her mother or talks to her on the phone. If [M.J.] feels that her mother is sick or she is worried, [M.J.] has a habit of . . . misbehaving. . . . [M.J.] has taken on the role of a worrier and it has caused her a tremendous amount of stress and depression.” DCFS and M.J.’s therapist were in agreement that M.J. should not be returned to Mother because M.J. was “still playing the role as the parent in her relationship with her mother and this is a big concern.” In October 2003, the court found that Mother was in compliance with

² Unspecified statutory references are to the Welfare and Institutions Code.

the case plan, but M.J.'s "therapy hasn't progressed to the point where emotionally, psychologically she could be returned."

In late October 2003, Claudia A. reported that M.J. was misbehaving, and M.J. was placed in a new foster home with the R.'s, who later became her legal guardians. M.J. told her new foster mother, Mrs. R., that Mother and the maternal grandmother told M.J. to "act up" while she was living with Claudia A. so DCFS would return her to Mother.

A March 2004 status review report stated that M.J. was doing well in school and had adjusted well to her new foster home. Mother continued to have unmonitored visits, but for several weeks the visits were monitored because Mother smoked cigarettes in M.J.'s presence after M.J.'s doctor had written a note stating that no one was to smoke around M.J., who had asthma. Mother told M.J. that she did not have asthma but was just congested. During visits with M.J., Mother continued to take pills, slept 9 to 10 hours during the day, and was in a "coma-like state." M.J. was scared and hid Mother's pills. The maternal grandmother told M.J. not to call the paramedics and to let Mother "sleep it off."

M.J. told the social worker that she did not want to live with Mother. In March 2004, M.J. submitted to her attorney and the court her handwritten "list," stating, "I feel [scared with] my mom [especially] when she's shaking," and, "It really breaks my heart when she's sleeping because every time I look at her, it's like she's not breathing. One time she had to go to the hospital and she couldn't breathe." As to her foster family, M.J. wrote that they "treat me like their real daughter," and, "I love the whole [foster] family like they love me."

In March 2004, the juvenile court terminated reunification services, finding that Mother was in compliance with the case plan but had not made sufficient progress and was not functioning well enough to return M.J. to her custody. A section 366.26 hearing was set for July 21, 2004.

From March to July 2004, Mother had problems adjusting her medications to deal with her diagnosis of major depression. M.J. did not feel safe during visits because she

had to cook her own meals and Mother was too sleepy to supervise her. During an unmonitored visit in June 2004, when M.J. called the maternal grandmother to tell her that M.J. had seen Mother take some pills and then fall asleep, the maternal grandmother told M.J. that it did not happen and began to scream at M.J., who hung up the telephone. In July 2004, the court ordered monitored visits until Mother was able to work out the problems with her medications.

After a hearing in September 2004, the juvenile court ordered a permanent plan of legal guardianship with the R.'s. Mother was not afforded visitation until DCFS could consult with M.J.'s therapist on the issue. After DCFS reported that both M.J.'s therapist and DCFS agreed that visitation should be at M.J.'s discretion, the court ordered in November 2004 that Mother was entitled to monitored visits in a therapeutic setting only. Because M.J.'s therapist reported in January 2005 that M.J. exhibited symptoms of depression, expressed anger at Mother, and was engaging in disruptive behavior at home and school, the court changed the frequency of the visits to once every four to five months. In January 2005, the juvenile court also terminated dependency jurisdiction.

In December 2006, Mother filed a section 388 petition, seeking custody of M.J. or increased visitation. The court resumed jurisdiction and granted a hearing on Mother's petition, which was heard in February 2007. DCFS's interim review report stated that M.J. was diagnosed with post-traumatic stress syndrome and had been on an "emotional 'roller coaster'" for the last few years. M.J. had periods, usually after talking with or visiting Mother, when M.J. would misbehave, "lying, stealing and acting out." In response to the social worker's question of whether M.J. wanted to return to Mother's custody, M.J. said that she would like to see Mother more often but was afraid to live with her.

In February 2007, the court denied Mother's request for custody but ordered monitored visits in a therapeutic setting once a month from February to May 2007; the matter was continued to May 2007 to obtain a recommendation from M.J.'s therapist on the issue of the frequency of visits. The court ordered that M.J. be present for the May 2007 hearing.

DCFS reported in May 2007 that M.J. was diagnosed with bipolar disorder, for which she was taking medication. M.J. had behavioral problems at home and at school and was in danger of failing sixth grade. M.J.'s therapist reported in April 2007 that in the last six months, Mother was not consistent with keeping her appointments for visits and M.J. resented Mother for not keeping her promises; M.J.'s guardians stated that M.J. would get anxious and nervous before she visited Mother. M.J. appeared for the May 2007 hearing, but Mother did not, as she was hospitalized for mental health reasons. M.J., through her attorney, told the court that she did not want to continue visitation with Mother. The juvenile court maintained the monthly visits and continued the matter to obtain the therapist's recommendation as to whether the visitation was detrimental to M.J.

In June 2007, M.J.'s therapist wrote: "The child has made it very clear that she does not want to have any contact of any sort with . . . [M]other today or in the future. She understands that . . . [M]other has problems with drugs and she does not want to be part of [M]other's life anymore. Child does not want to have any more visits with . . . [M]other at this time. The child is getting confused and frustrated because she feels pressured to continue seeing Mother."

At the June 2007 hearing, the court ordered that Mother was to have no visits or telephone contact with M.J. until the review hearing in November 2007 and that M.J.'s therapist was to submit a report containing a recommendation for Mother's visits.

In November 2007, DCFS reported that after the last court hearing, M.J. had not asked to speak with or visit with Mother. Although M.J. was repeating sixth grade, she was on the school volleyball team and was getting "A's" in all of her classes. Both M.J. and her therapist wrote letters for the court hearing. The therapist reported that M.J. told him many times that she does not want to see Mother anymore because she does not want "to get hurt"; during periods when M.J. had no visits with Mother, her behavior was stable. The therapist opined that it would be detrimental to M.J.'s mental health to force her to continue seeing Mother and that M.J. should continue with her counseling sessions.

M.J. wrote in pertinent part: “I’m expressing my true feeling[s] from my heart. . . . When I’m around [Mother,] I’m always scared. I’m unsafe. . . . She is always confused or intoxicated. I’m very unstable with Mother. . . . I could never concentrate with my studies. Which are my priority. Last year she made my life a living inferno. I failed 6th grade because I couldn’t concentrate. . . . I now have a real family: a new mother, a new father, a brother, lots of sisters, and a grandmother. I also have aunts, uncles, and cousins. I feel like this is my real home with a real family. Now I could be a real child. I don’t worry about being an adult like before. My birthday is coming up December 4 and I wish you could close this case forever. I also want to be adopted. Please honor my emotional stability which is very important in a child’s life. All this comes from the heart.”

At the November 2007 hearing, the court found that, based on the information before the court, the visits were detrimental to M.J. and ordered no further visits. The court was inclined to terminate jurisdiction, but because Mother’s attorney objected and wanted M.J.’s therapist to testify, the court continued the matter to January 2008. The court also stated that it would reevaluate the issue of visitation.

Judge Emily Stevens, who had presided over the case since its inception in 2002, was not present for the January 2008 hearing, when a juvenile court referee continued the matter to March 2008. After the referee stated that M.J. was to be present, her attorney stated that she wanted to waive M.J.’s appearance because “her appearance in court is problematic for her. It causes her great anxiety.” Mother’s attorney then stated, “We’re going to request that [M.J.] be present to offer testimony and Mother continues to seek visitation with her daughter.” The juvenile court referee responded, “Noted.”

In March 2008, the matter was again before a juvenile court referee. The therapist appeared in court, but M.J. was not present. M.J.’s attorney stated that she was waiving M.J.’s appearance for that day. The matter was continued for the return of Judge Stevens to April 2008.

On April 8, 2008, the therapist was not present, so Judge Stevens continued the matter to April 30, 2008. Mother’s counsel asked that M.J. be present at the April 30

hearing to testify as to whether visitation with Mother was detrimental to her. DCFS objected to M.J.'s testifying. M.J.'s attorney also objected on the ground that it was not "probative to ask a 13 year old whether she believes it's detrimental to visit with her mother. [¶] She has a therapist, the therapist has written a report. I've spoken with her, I know her position. I think it would be harmful for her to have to sit here in court and explain why she doesn't want to see her mother. When all the information, including in [M.J.'s] own handwriting she's written letters to the court regarding why she doesn't want to visit."

The court agreed with DCFS and M.J.'s attorney, stating that it could be "highly inappropriate and detrimental to have [M.J.] come in here and be cross-examined about her feelings, to expect that she can talk about her mental health and her emotional state. [¶] To ask her questions about that would place her at high risk based on all of the information we've been receiving over the last . . . several years. It would be inappropriate. [¶] . . . The therapist has written letters. The social worker has talked about it. [¶] The facts regarding her are in the file. If [Mother's attorney] wants to dispute the facts provided by the professionals, those people can be here. . . . [¶] The effect upon [M.J.] can be described by the professionals and unless there is some other reason to bring this child into it, your request is denied."

After Mother's attorney asserted that the information in the reports was hearsay, the court responded, "The case law says that I can receive that kind of hearsay and the case law also says that if I make a determination that it's not in the child's best interests to testify, that the mother does not have the right to cross-examine the child regarding whether she wants to see the mother. If I can get that information reliably from other professionals, including the social worker, her therapist and her attorney and probably her caretaker. And we have her own letters. [¶] To put her on the stand to do that for the mother — to satisfy the mother is highly inappropriate, when the mother already knows it is." The court then addressed Mother, stating that "to make your daughter sit there to your face and say it would be hurtful to her at this time."

M.J.'s therapist testified at the hearing on April 30, 2008. The juvenile court found that visitation with Mother was detrimental to M.J. and terminated visitation. The court also terminated dependency jurisdiction. The court explained its ruling: "It would be detrimental in the extreme to force [M.J.] to visit with the mother. [M.J.] was open to reunification with her mother and to visits with her mother. And the mother, because of her own limitations, sabotaged anything positive that could have come out of that opportunity. [¶] The mother . . . is not understanding, sensitive in any way to [M.J.] and the problems that she has. [¶] And the mother's behavior when she's been given the opportunity only exacerbates problems that [M.J.] has as a result of the mother's behavior in the past. [¶] This child went from not having mental health issues to having very extreme and severe mental health issues that required medication. [¶] . . . [¶] So I am not going to force this child, who has been damaged mentally, emotionally, psychologically and physically, over this more than a decade of abuse; emotional, psychological, mental and otherwise. [¶] This child needs to be able to move forward."

The court also rejected retaining jurisdiction for the purpose of conjoint therapy, stating, "There is no reason in the world to make this child go back and to relive the mother's history with this child in order to give the mother another chance to destroy this child. [¶] . . . [¶] I cannot foresee any time in the near future when it would be appropriate for [M.J.] to have to visit her mother or to have to go into therapy to visit her mother. She should not be subjected to going backwards with her treatment program just so that the mother can see her. [¶] . . . To give the mother successive chances at destroying this child, because that's what has happened."

Mother appealed from the April 30, 2008 order. Although Mother does not directly challenge the no-visitation order, she seeks to reverse the findings and orders of April 30, 2008, on the ground that the court deprived Mother of due process when it denied her request to have M.J. testify.

DISCUSSION

"While a parent in a juvenile dependency proceeding has a due process right to a meaningful hearing with the opportunity to present evidence [citation], parents in

dependency proceedings “are not entitled to full confrontation and cross-examination.” [Citation.] Due process requires a balance. [Citation.] The state’s strong interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence [citation]’ [Citation.] [¶] Different levels of due process protection apply at different stages of dependency proceedings. [Citations.] After reunification services are terminated and a section 366.26 hearing is set the focus shifts from the parent’s interest in reunification to the child’s need for permanency and stability. [Citation.]” (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 733.)

“In deciding requirements of due process, the court evaluates three elements: the private interests at stake, the government’s interest, and the risk the procedures used will lead to an erroneous decision. [Citations.] [¶] The private interest at stake in a dependency proceeding is enormous. A parent’s interest in the companionship, care, custody and management of his or her children is a fundamental civil right. [Citation.] Children, too, have a compelling independent interest in belonging to their natural family. [Citation.] In addition, each child has a compelling interest to live free from abuse and neglect in a stable, permanent placement with an emotionally committed caregiver. [Citation.] The governmental interest in a child’s welfare is significant. ‘[T]he welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.’ [Citations.]” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 222–223.)

“[B]oth federal and California courts have held that due process does not always entitle persons accused of child molestation, whether in criminal proceedings or in dependency proceedings, to direct face-to-face confrontation and cross-examination of the children they are accused of molesting. As a matter of constitutional principle, the United States Supreme Court has held that a state’s compelling interest in protecting child victims of sex crimes from further trauma may in some instances outweigh the right to confrontation. [Citation.] Likewise, the California courts have approved the use of statutory procedures in dependency cases which deprived parents accused of molestation of the opportunity to confront and cross-examine child witnesses directly.” (*In re Elizabeth T.* (1992) 9 Cal.App.4th 636, 641.)

Because due process in a dependency proceeding is a flexible concept which depends on the circumstances and a balance of various factors (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1120, 1122), the court in *In re Jennifer J.* (1992) 8 Cal.App.4th 1080 held that where “the child’s desires and wishes can be directly presented without live testimony, where the issues to be resolved would not be materially affected by the child’s testimony, and where it is shown that the child would be psychologically damaged by being required to testify, . . . the juvenile court judge has the power to exclude such testimony.” (*Id.* at p. 1089 [at section 366.26 hearing, juvenile court properly excluded testimony of seven-year-old showing bonding with parents and desire for continued contact with parents].)

Whether we review the juvenile court’s ruling here for abuse of discretion (*In re Jennifer J.*, *supra*, 8 Cal.App.4th at p. 1088) or de novo (*In re Dakota H.*, *supra*, 132 Cal.App.4th at p. 222), we conclude that the juvenile court did not err in denying Mother’s request to cross-examine M.J. There was substantial evidence in the record of M.J.’s feelings, wishes, and desires with respect to visitation, including two handwritten letters. M.J. also expressed her feelings about visitation to her therapist, her legal guardian, her attorney, and the social worker, and M.J.’s feelings on the issue remained consistent for many months before the April 2008 hearing. There was thus little risk that the lack of M.J.’s testimony on April 30, 2008, would lead to an erroneous decision.

There was also substantial evidence that testifying would cause M.J. great psychological harm: at the mere prospect of visiting Mother, M.J. would become anxious and upset; after visiting Mother, M.J. tended to “act up”; and during periods of visitation, M.J. would perform poorly in school. M.J. thus had an interest in stability and in being free from emotional abuse and turmoil.

In this case, both the child’s interests and the government’s interest coincide and outweigh Mother’s right to cross-examine M.J. Thus, a balance of the interests at stake militates in favor of denying Mother’s request that M.J. testify. The juvenile court did not err in denying Mother’s request that M.J. testify.

DISPOSITION

The April 30, 2008 order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

WEISBERG, J.*

* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.